87-1627

Supreme Court, U.S.
FILED
MAR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CLAYBORN E. NASH, AND
GORDON R. COOPER, II

Appellants

V.

CITY OF HOUSTON CIVIC CENTER

Appellees

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Gordon R. Cooper, II
Counsel for Appellant
COOPER & COOPER
4103 La Branch Street
Houston, Texas 77004

Of Counsel:
Yvonne M. Williams
COOPER & COOPER
Attorneys at Law

I.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether Attorney fees awarded for a prevailing Title VII plaintiff at trial level, may be reversed and abated by the appeals court when the judgment for the plaintiff is affirmed?

(2) Whether the doctrine of law of the case should apply to attorney fee awards to prevailing Title VII plaintiff's once an appeals panel has affirmed the plaintiff's successful ruling while reversing the attorneys' fee award.

NO. _____

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OCTOBER TERM, 1988

CLAYBORN E. NASH, AND
GORDON R. COOPER, II

Appellants

V.

CITY OF HOUSTON CIVIC CENTER

Appellees

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice And Associate Justices of the Supreme Court of the United States:

Gordon R. Cooper, II respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit filed December 9, 1987.

II.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Appellant, Gordon R. Cooper, II, certifies that the following list of persons have an interest in the outcome of this case.

CITY OF HOUSTON CIVIC CENTER

Appellees

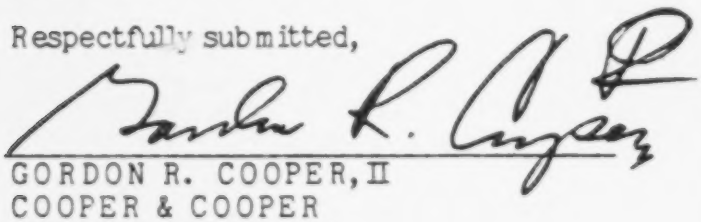
GORDON R. COOPER, II

Appellant

COOPER & COOPER
Attorneys at Law

DAVID T. LOPEZ
Attorney at Law

Respectfully submitted,



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III.

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STATUTES INVOLVED

42 U.S.C. 2000e et seq - Title VII
42 U.S.C. 1981
42 U.S.C. 1988

OPINIONS BELOW

District Court Memorandum Opinion and Final Judgment, dated April 30, 1985 in favor of Plaintiff class, is printed at Appendix A, and is not officially reported.

Fifth Circuit Court of Appeals judgment reversing and remanding is reported at 800 F. 2d 491, (5th Cir. 1986), reh. and reh. en banc denied, 805 F. 2d 1030 (5th Cir. 1986).

District Court Memorandum and Order of Dismissal, dated April 13, 1987 is printed at Appendix B and is not reported.

District Court Memorandum and Order for reimbursement of interim attorneys fees, dated June 10, 1987, is printed at Appendix C and is not officially reported.

Fifth Circuit Court of Appeals judgment affirming Nash v. City of Houston Civic Center, 800 F. 2d 491 (5th Cir.), reh'g denied, 805 F.2d 1030 (5th Cir. 1986), dated December 9, 1987 (Summary Calendar), is printed at Appendix D and is not officially reported.

Fifth Circuit Court of Appeals judgment denying

petition for rehearing, dated January 5, 1988, is printed at Appendix E and is not officially reported.

JURISDICTION

The date of the Judgment of the Fifth Circuit Court of Appeals sought to be reviewed is December 9, 1987 which is also the date of entry. Jurisdiction of this court is invoked under 28 U.S.C. section 1254(1).

STATEMENT OF THE CASE

These plaintiffs brought a class action in 1979 alleging racial discrimination on the part of their employer, the City of Houston Civic Center Parking Division (City) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. and the Civil Rights Act of 1866, 42 U.S.C. 1981. On April 30, 1985 the Trial Court entered a final judgment with an accompanying memorandum granting relief to the class members and attorneys fees for their respective attorneys, Gordon R. Cooper, II and David T. Lopez.

Gordon R. Cooper, II was attorney in charge of the class of plaintiffs involving Clayborn E. Nash and Alvin Moore. Immediately prior to the trial, David T. Lopez was appointed by the court to represent a number of the class members while Mr. Cooper remained attorney of record for Plaintiffs Nash and and Moore.

The trial court awarded $76,875.00 in attorneys fees to Mr. Cooper and $10,205.00 in attorneys fees to Mr. Lopez. Plaintiff Clayborn E. Nash was awarded $58,285.47 in back pay and reinstatement. Plaintiff Alvin Moore was awarded $22,550 in back pay.

(Appendix A)

The City filed notice of appeal on May 29, 1985. On appeal Mr. Lopez represented the majority of the class including Mr. Moore. Mr. Cooper continued to represent Mr. Nash on appeal. On July 10, 1985, the City filed a Motion to Stay Judgment which was denied on September 4, 1985.

On September 24, 1986, the Fifth Circuit in Nash v. City of Houston Civic Center, 800 F. 2d 491 (5th Cir. 1986) affirmed in part and reversed in part holding as follows:

> The judgment of the district court against the City and in favor of the plaintiff class, Clayborn Nash and Ronnie Blount is reversed, and those claims are dismissed. The order of injunction is vacated. The denial of the petition for intervention by Charlotte Dudley and Quida Sanderson is affirmed. The judgment in favor of Alvin Moore against the City is affirmed. Id., at 492.

The only relief upheld by the Fifth Circuit was that granted to plaintiff Moore. In an almost unprecedented act the Circuit then reversed the attorneys fees awarded for Moore's trial counsel, Mr. Cooper and implicitly precluded award of attorneys fees to Mr. Moore's appellate counsel, Mr. Lopez:

> The record convinces us that only trivial effort was expended by counsel on Moore's personal claims and that remand for consideration of attorney's fees for this cause is unwarranted. If affidavits to the contrary are presented on Motion for rehearing, they will be considered. Id., at 497.

Mr. Cooper then filed a Motion for Rehearing on attorneys fees accompanied by an affidavit showing that of the 512 attorney hours expended in his representations of the class, some 128 hours of same were expended in representations of plaintiff Moore. (Appendix F) For these services, Mr. Cooper requested attorneys fees. Mr. Lopez also requested a rehearing in behalf of two

other individuals and a Motion for Rehearing en banc in behalf of the class.

On November 5, 1986 in a per curiam decision, the 5th Circuit summarily denied all Motions. (805 F. 2d 1030)

This litigation was reopened by the trial court on December 19, 1986 per the 5th Circuit Court of Appeals judgment on September 24, which issued a mandate on November 17, 1986, affirming in part, reversing in part, and remanding to the District Court for further proceedings. Nash at 497.

After holding a status conference the trial court ordered all Motions regarding attorneys fees to be filed by April 11, 1987.

Attorney Cooper filed a second Motion for attorneys fees on April 9, 1987 with the trial court. On April 13, 1987, the court entered an order of dismissal by concluding it lacked jurisdiction to rule on attorney's fees since the 5th Circuit opinion stated "remand for consideration of attorney's fees . . . . . is unwarranted." (Appendix B)

While the appeal was pending of the original judgment, the trial court in addition to denying defendant City's Motion staying injunctive relief, granted a Motion staying money payments to the class and ordered attorneys' fees to be paid to Mr. Cooper and Mr. Lopez for services before the trial. Mr. Cooper was paid $15,000.00, a portion of the attorneys fees awarded to him by the trial court, and Mr. Lopez was paid $10,127.78 as the full attorney's fees and costs as awarded by the trial court.

On April 10, 1987, Defendant City filed a Motion for Reimbursement of Interim attorney's fees, citing in its Motion the Fifth Circuit's language that consideration of attorneys fees is unwarranted. Accordingly, the City argued that the judgment being final, all attorneys' fees awards should be reimbursed to the City.

Mr. Lopez agreed in principle to reimburse the defendant for the interim award but without prejudice to his seeking fees for the appeal (wherein he represented Moore) and for pursuing allegations of retaliation against the class members.

On May 29, 1987, the trial Court ordered a conference and therein made separate rulings on Mssrs Cooper and Lopez attorney fee awards. Regarding Mr. Lopez, the court denied Mr. Lopez's Motion for an offset of $6,000, on June 10, 1987.

The trial Court granted the City's Motion for Reimbursement and ordered Mr. Cooper to pay the city reimbursement of $15,000. (Appendix G)

Mr. Cooper filed a Notice of Appeal to the Fifth Circuit from the order denying his attorney's fees on May 29, 1987. On June 5, 1987, Mr. Cooper filed a Motion and Memorandum to Reconsider Judgment on attorneys' fees with the trial Court.

On June 17, 1987, the trial court again rejected Mr. Cooper's attorneys fees request. (Appendix H) On his last appeal to the Fifth Circuit, he was again denied as of December 9, 1987.

L WHETHER ATTORNEY FEES AWARDED FOR A PREVAILING TITLE VII PLAINTIFF AT TRIAL LEVEL MAY BE REVERSED AND ABATED BY THE APPEALS COURT WHEN THE JUDGMENT FOR THE PLAINTIFF IS AFFIRMED?

After over eight (8) years of litigating a successful

class action suit for damages arising from discrimination in employment claims, then counsel for the class of plaintiffs, Gordon R. Cooper, II, was presented with the reality that no attorneys fees will be forthcoming for his services. Although the trial court amply awarded attorneys fees, the appeals court reversed the majority of the courts opinion taking with it any and all entitlement to attorneys fees while affirming one plaintiff's damages award of $22,500.00.

To date, the attorney is to receive no compensation for his services, while he was given $15,000.00 in interim fees, the district court has since ordered reimbursement of the entire amount to defendant City. The purpose of Civil Rights Litigation is to assure plaintiff's equal access to courts by providing for attorney fee awards when successful; to not provide attorneys fees in such cases serves as a chilling affect to Title VII plaintiff litigants.

The Fifth Circuit Court of Appeals erred in denying attorneys fees for the representation of the successful plaintiff, Alvin Moore, who was represented

by Mr. Cooper at the trial level.

The Fifth Circuit did not apply the proper legal analysis in its decision denying fees, ignoring Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) and its own Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974). The Court stated:

> "The record convinces us that only trivial effort was expended by counsel on Moore's personal claims and that remand for consideration of attorneys' fees isolated for this cause is unwarranted. If affidavits to the contrary are presented on Motion for Rehearing, they will be considered". Nash, 800 F. 2d at 497.

The facts herein are analogous to those in Hensley v. Eckerhart, 461 U.S. 424 (1983). This matter involved representation of a class of plaintiffs who were ultimately unsuccessful on appeal, but for one. In Hensley, supra, this court wrote of one plaintiff which prevailed on one of several claims but recognized the need to note attorney hours expended on unsuccesful

claims. This Court cites Hensley in City of Riverside v. Rivera, ____ U. S. ____ 41 FEP Cases 65, 67, (1986), to wit:

> "In (some) cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the Litigation as a whole, making it difficult to divide the hours expended on a claim -by-claim basis. Such a lawsuit cannot be viewed as series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the Litigation. Id. at 435, 31 FEP Cases, at 1173 - 1174.

This court went on to explain the Hensley emphasis to mean, "(w)here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee; and that the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." Ibid.

The requirement of Hensley was met by Mr. Cooper. Hensley stated that the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Id. at 433.

Riverside, supra, gives further guidance in interpreting Hensley. The Fifth Circuit discounted wholly, the trial court's assessment of fees and on petitioners' Motion for Rehearing, where the affidavit of attorney hours was prepared and presented, the court drew legal conclusions and facts totally contrary to the record. Nash, 800 F. 2d at 497. Riverside explains:

> Hensley stated that a fee applicant should "exercise 'billing judgment' with respect to hours worked." 461 U.S., at 437, 31 FEP Cases, at 1174. Petitioners maintain that respondents failed to exercise "billing judgment" in this case, since they sought compensation for all time spent litigating this case. We think this argument misreads the mandate of Hensley. Hensley requires a

fee applicant to exercise "billing judgment" not because he should necessarily be compensated for less than the actual number of hours spent litigating a case, but because the hours he does seek compensation for must be reasonable. "Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary . . ." Id., at 434, 31 FEP cases, at 1173. In this case, the District Court found that the number of hours expended by respondents' was reasonable. Thus, Counsel did, in fact, exercise the "billing judgment" recommended in Hensley.

Hensley also stated that a fee applicant should "maintain billing time records in a manner that will enable a reviewing court to identify distinct claims". Id., at 437, 31 FEP Cases, at 1174. Petitioners submit that the time records submitted by respondents'

> attorneys made it difficult for the District Court to identify and separate distinct claims. The District Court, however, does not appear to have shared this view. In any event while it is true that some of the disputed time records do not identify the precise claims worked on at the time, we find this lapse unimportant, in light of the District Court's finding that all of respondents' claims were interrelated. Riverside, 41 FEP Cases at 68, Note 4.

The remarkable aspect of the case herein is that the District Court awarded fees to Mr. Cooper as attorney for the class in the amount of $76,875.00. (Appendix A) Yet after appeal, the Fifth Circuit reversed all but Mr. Moore's award.

To date, neither of Mr. Moore's attorneys have been granted fees. Mr. Coopers' fees as trial counsel has been denied. And Mr. Lopez fees as appellant counsel have also been denied. See Appendix E, the judgment denying Mr. Lopez' petition for rehearing.

If the inquiry was "billing judgment", then such was never addressed. Nor were the factors in Johnson discussed. Furthermore, the appellate court did not fully address the issue of Mr. Cooper's time expended on the "prevailing party's" claim versus the time expended on the class plaintiff's claims, as is the standard in such cases.

In Hennigan v. Ouachita Parish School Bd, 749 F. 2d 1148 (5th Cir. 1985) the court wrote:

> ". . . (T)he first element that must be established by a plaintiff claiming prevailing party status is whether, as a practical matter, the plaintiff's goal was achieved . . . ." Id. at 1152

Clearly, plaintiff Moore was a prevailing party; in fact, he was the only prevailing party in the entire class of plaintiffs. In Leroy v. City of Houston, 648 F. Supp. 537 (S.D. Tex. 1986), Judge McDonald delineated the analysis for awarding fees viz. Johnson:

> It (the Fifth Circuit) . . . . has instructed district courts to first ascertain the nature and extent of the services supplied by the attorney from a statement showing the number of hours worked and an explanation of how these hours were spent. The court should next determine the customary hourly rate of compensation. These are essentially Johnson facts 1 and 5. The court should then multiply the number of hours reasonably expended by the customary hourly rate to determine an initial amount for the fee award. Finally, the court should adjust the fee on the basis of the other factors, briefly explaining how they affected the award. In re First Colonial Corp. of America, 544 F. 2d 1291, 1298-1300 (5th Cir. 1977). See also Copper Liquor, Inc. v. Adolph Coors Co., 624 F. 2d 575, 581-84 (5th Cir. 1980). Anderson v. Morris, 658 F. 2d 246, 249 (4th Cir. 1981).

Leroy at 546. The Court in Leroy concluded that "although the Supreme Court has reshuffled the Johnson

factors somewhat, the factors are still alive and well". Id at 547.

While the Leroy case discussed fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S. (1988), the same analysis is applicable to Title VII. The Supreme Court has applied the same standards to both section 2000e - 5(K) and section 1988. Hensley, 461 U.S. at 433 n.7.

To deny attorneys fees in this matter sends a chilling effect to civil rights litigants and promotes an unconscionable legal precedent. "Generally, attorneys' fees are awarded to such plaintiffs in Title VII actions as a matter of course, 'unless special circumstances would make such an award unjust." (cite omitted). Zabkowicz v. West Bend ____ F. 2d. ____, 40 FEP Cases 1171, at 1177. (7th Cir. 1986).

"See also Jordon v. United States Department of Justice, 691 F. 2d 514, 518 (D.C. Cir. 1982) (noting that a "(t)otal denial of requested fees . .. is a stringent sanction, to be reserved for only in very limited circumstances")." Zabkowicz, at 1179. The Zabkowicz

court left the determination of a reasonable fee to the district court. Id. at 1179.

The district court made its award of fees to Mr. Cooper with all evidence before it at the time. Query then, the validity of the Fifth Circuit, sua sponte, denying appropriate fees to counsel with only a cursory mention of "trival effort expended by Counsel" for the only prevailing party (Mr. Moore). Such a ruling without the appropriate legal analysis must be reversed. This matter is not such a severe nature that time expended on the prevailing party's behalf should be sanctioned by the denial of fees.

II. WHETHER THE DOCTRINE OF LAW OF THE CASE SHOULD APPLY TO ATTORNEY FEE AWARDS TO PREVAILING TITLE VII PLAINTIFF'S ONCE AN APPEALS PANEL HAS AFFIRMED THE PLAINTIFF'S SUCCESSFUL RULING WHILE REVERSING THE ATTORNEYS' FEE AWARD.

Upon reconsideration by the trial court of counsel's fee awards, that court denied same stating:

> Upon review of the appellate decision in this case, however, the Court has determined that it lacks jurisdiction to rule on the

pending Motion. The appellate opinion clearly states that "remand for consideration of attorney's fees . . . is unwarranted." (Appendix C)

The district Court apparently felt constrained by this language to act although the 5th Circuit has added . . . "(i)f affidavits to the contrary are presented on Motion for Rehearing, they will be considered". Nash, at 497.

On the third appeal by Mr. Cooper for attorneys fees, the Fifth Circuit denied same "both on the merits and pursuant to the law of the case doctrine", citing Schwartz v. NMS Industries, Inc., 575 F. 2d 553 (5th Cir. 1978). Nash, Cooper and Lopez v. City of Houston Civic Center, No. 87-2723 Summary Calendar, December 9, 1987, Fifth Circuit. (Appendix D)

The allegation of decision on the merits were addressed above. The law of the case doctrine will be addressed at this time.

The law of the case doctrine should have no applicability to attorney fee awards in civil rights litigation. As it has been currently developed in the Fifth Circuit, the doctrine "generally precludes

reexamination of issues of law or fact decided on appeal, either by the district court on remand or by the appellate court itself on a subsequent appeal". Dickinson v. Auto Center Manufacturing Co., 733 F. 2d 1092, 1096 (5th Cir. 1983); Conway v. Chemical Leaman Tanklines, Inc. 644 F. 2d 1059, 1061 (5th Cir. 1981); Todd Shipyards Corp. v. Auto Transportation, S.A., 763 F. 2d 745, 750 (5th Cir. 1985).

These are exceptions wherein the doctrine does not apply:

> (1) when a subsequent trial produces substantially different evidence,
> (2) when a controlling authority has made contrary decision of the law applicable to the issues, or
> (3) the prior decision was clearly erroneous and would work an injustice. Morrow v. Dillard, 580 F. 2d 1284, 1292 (5th Cir. 1978); White v. Murtha, 377 F. 2d 428, 432 (5th Cir. 1967).

Applying the above exceptions to the matter herein, exceptions number two and three would be proper grounds not to apply the doctrine. The ruling was clearly erroneous and does work an unjustice; furthermore, controlling authority has made contrary decisions of the law applicable to the issues herein. See discussion in

section I above. Note also the Seventh Circuit's decision in Tomazzoli v. Sheedy, 804 F. 2d 93, 97 (7th Cir. 1986):

> "Once established an appellate court should not disturb a district courts' fee award unless the court commits an error of law in the computation or has abused its discretion in calculating the amount. Lynch v. City of Milwaukee, 747 F. 2d 423, 426 (7th Cir. 1984); see also Pennsylvania v. Delaware Valley Citizen's Council For Clean Air, ____ U.S. ____, 106 S. Ct. 3088, 3100, 92 L. Ed. 2d 439 (1986) (Blackman, J., concurring in part and dissenting in part) (" the proper standard of review of an attorney fee award is abuse of discretion"). Hensley, 461 U.S. at 433. (Our emphasis)

Tomazzoli at 97. "The method of calculating a fee award rests within (the district court's) sound discretion". Gekas v. Attorney Registration and Disciplinary Commision, 793 F. 2d 846, 851 (7th Cir. 1986) (per curiam). Tomazzoli, at 97.

In the first Nash appeal, 800 F. 2d at 497, the Fifth Circuit does not address a standard of review viz. the denial of fees. It simply does so in a conclusionary manner. There is no mention or inquiry on the process utilized by the trial court to arrive at the fees awards. And finally, there is no reference made to abuse of discretion. The ruling was therefore clearly erroneous.

The law of the case doctrine does not belong in disputes concerning legal fees in civil rights litigation. There is ample precedent and guidance in the setting of fees (to the few successful litigants) in this area of our jurisprudence. Assuming, in arguendo that this doctrine should apply, its exceptions are available and should have been applied to the matter herein.

CONCLUSION

The issues presented by the instant case are significant. The denial of attorney fee awards to successful civil rights litigants is a grave and unconscionable precedent for this area of our jurisprudence. The Fifth Circuit Court of Appeals' decision is directly in conflict with decisions in the

Seventh Circuit Court of Appeals on this issue. For the foregoing reasons a writ of certiorari should issue to review the judgment, opinion and related rulings of the Fifth Circuit Court of Appeals.

Respectfully submitted,
COOPER & COOPER
4103 La Branch
Houston, Texas 77004
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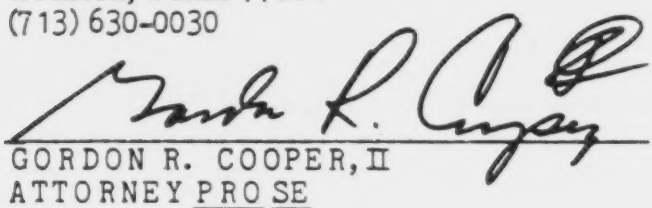

GORDON R. COOPER, II
ATTORNEY PRO SE

Of Counsel
Yvonne M. Williams
COOPER & COOPER
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari has been mailed to all Attorneys of Record on this the 16th day of March, 1988.

GORDON R. COOPER, II

AFFIDAVIT

STATE OF TEXAS *

COUNTY OF HARRIS *

BEFORE ME, the undersigned authority, on this day personally appeared GORDON R. COOPER, II, known to me to be a credible person competent in all respects to make this affidavit, and who, being by me sworn upon oath, stated:

I am a member of the Bar of the Supreme Court of the United States, and I was the attorney of record for the appellant in the matter of Clayborn Nash and Gordon R. Cooper, II v. City of Houston Civic Center.

On the 8th day of March 1988, I deposited into the United States Mail with first class postage prepaid and properly addressed to the Clerk of the Supreme Court, within the time allowed for filing, The Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit pursuant to USSC Rule 28. 2.

This Petition for Writ of Certiorari is presently non-conforming and is one copy. A conforming Petition in forty (40) copies pursuant to the Rules of the Supreme

Court of the United States will be mailed accordingly within five days.

SIGNED this ___ day of _____, 1988.

signed _____
GORDON R. COOPER, II

SWORN AND SUBSCRIBED TO BEFORE ME on this 8th day of March, 1988

Notorized

_____
Notary Public for
The State of T E X A S

MY COMMISSION EXPIRES:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLAYBORN E. NASH	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	H-79-832
CITY OF HOUSTON	*	Consolidated with C.A.
CIVIC CENTER; ET AL.	*	H-81-1471
	*	H-81-2500
	*	H-81-2596

MEMORANDUM OPINION

The Plaintiffs brought this class action alleging racial discrimination on the part of their employer, the "the City") in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. and the Civil Rights Act of 1866, 42 U.S.C. section 1981. This action was bifurcated for trial on the issues of liability and relief. In light of the Court's holding after the trial regarding liability issues and after conducting a hearing on the issues relating to relief, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Clayborn Nash, the first named Plaintiff, filed a charge of unlawful discharge and racial discrimination with the Equal Employment Opportunity Commission (hereinafter the "EEOC) on May 2, 1977. Upon receipt of notice of his right to sue, he instituted this suit which was later consolidated with similar suits filed by Alvin Moore, Ann Jackson and others. Class certification was granted, limited to those Title VII claims which could have been the subject of a timely EEOC charge on or before May 2, 1977 and those Section 1981 claims which arose during the two years preceding the filing of this lawsuit.

The class consists of those black employees who are or were classified as part-time parking attendents, who worked 50 weeks consecutively and averaged at least 40 hours per week at any time during the relevant time period.

The Court finds that the discriminatory actions taken by the City in classifying the class members as part-time when they actually worked on a full-time basis deprived the Plaintiffs of substantial employment

opportunities and economic benefits. Because of this part-time status, the Plaintiffs were deprived of civil service status, vacation time, sick leave, merit increased, longevity pay, pension benefits, and job transfers.

The City saved considerable amounts of money by classifying the class members as part-time employees, while working them as they would any full-time employee.

Based on the evidence presented by the parties, and by agreement of the parties, the Court finds that the members of the class were deprived of back pay in the amounts set forth below:

Class Members	Payment Due
Moses Adams	$ 2,731.18
Danny Allen	2,286.42
George Allen	2,855.40
Okoli Bennett	9,963.24
Romie J. Blount	12,697.19
Jerry L. Buckley	8,288.43
Calvin E. Clay	3,144.14
Allen Connerly	2,643.10
Barbara Flanagain	771.78
G. W. Garrett	9,943.24
Walter Garrett	17,166.68
Riley Gilliam	3,086.06

Albert J. Hamilton	17,166.68
Dorothy Lee Harris	5,787.73
Robert E. Holden, Jr.	14,863.14
C.V. Hunt	3,614.51
Ann Marie Jackson	13,683.68
Clifton Jackson	10,660.19
Kenneth Jackson	2,112.48
Lonnie Johnson	7,221.61
Vincent Johnson	2,168.75
Margie Lewis	4,569.90
Mable J. Moore	1,703.17
Curtis Joe Porter	12,160.29
Leo Porter	9,208.49
Naymond D. Roach	8,447.78
Clarence Robinson	9,136.00
Raymond A. Rymer	7,076.21
Michael E. Sherman	4,206.30
Eddie Sims	13,683.68
Debbie Smith	4,868.99
Jeffery O. Taylor	13,171.09
Jessie G. Taylor	595.52
Joe D. Teagle	12,174.29
Lonnie Teagle	606.06
Bernice Washington	14,793.21
Leonard M. Williams	570.77

The attorney for the Plaintiffs have filed affidavits setting forth their hours expended on this case and their hourly rates. The Defendant agrees that the hours

expended and the hourly rates are reasonable. The court finds that Mr. Gordon R. Cooper, II has expended 512.5 hours at $150.00 per hour on this case. Mr. David T. Lopez has expended 66.7 hours at $150.00 per hour and his associated Murray E. Malakoff devoted two hours at $100.00 per hour on Plaintiff's case. In addition, Mr. Lopez has incurred $322.78 in costs related to this lawsuit. The court finds these hours, rates and costs to be reasonable.

The Court now turns to the claims of the individual Plaintiffs.

Clayborn E. Nash

Nash was unlawfully terminated on April 14, 1977. Since his termination, Nash has sought other employment but has devoted the majority of his time to managing his own business. Nash owned his own business while employed by the City but he employed contract workers to perform much of the work involved in the business.

From April 14, 1977 to the present, Nash has worked in his own business approximately six hours a day, five days a week, fifty-two weeks a year. The uncontested evidence proves that Nash earns

approximately $4.00 an hour.

The Court finds that Nash has saved approximately $6,240.00 a year by performing the work he would have had to hire contract workers to perform had he not been employed and able to personally work in his business.

The uncontroverted evidence proves the City's unlawfully termination of Nash deprived him of the following:

Back Pay	$ 89,862.90
Vacation Pay	4,960.16
Sick Pay	7,976.43
Longevity Pay	1,692.00
Holiday pay	3,973.98
TOTAL:	108,465.47

The Court finds that Nash earned approximately $50,180.00 over the past eight years by working in his own business and that Plaintiff's damages should be reduced accordingly.

Alvin Moore

In 1976 Moore became the Parking Superintendent for the Civic Center Parking Garage.

Moore did not approve the termination of Nash and

so testifed in January 1980 by deposition and in the trial of the Nash consolidated cases.

Moore applied for the position of Parking Garage Manager; however, Carl McCullough was hired for the position on April 14, 1980 in place of Moore.

Moore was qualified for the position of Manager of the Parking Garage but the Court finds he was denied such position in retaliation for giving testimony in support of Nash's claim.

McCullough resigned effective June 10, 1983. This Manager's position remained unfilled until it was abolished along with a second Manager's position effective January 17, 1984 as part of a layoff in the Civic Center Department and a general reorganization.

The Court finds that had Moore been awarded the position of Manager of the Parking Garage in place of McCullough, he would not have resigned the position but would have continued in such position until the Manager's position was ultimately eliminated by the reorganization effective January 17, 1984.

The Court finds that Moore suffered a loss of

salary from Arpil 14, 1980 to January 17, 1984 by being denied the Manager's position. During this time frame Moore earned a bi-weekly salary ranging from $677.60 to $849.80. On the other hand McCullough during this same time earned a bi-weekly salary ranging from $692.40 to $1111.30. If Moore had been assigned the Manager's position, he would have received approximately $22,550.00 more than his earnings as a Superintendent from Arpil 14, 1980 to January 17, 1984, and is entitled to damages in this amount.

Romie Blount

On January 7, 1981 Blount filed an EEOC claim alleging racial discrimination. On January 31, 1981 his hours were reduced without any explanation. Blount's protests earned him the status of troublemaker. On September 16, 1981 he was fired from supposed in subordination and refusal to work where assigned.

Blount appealed his dismissal to the director of Civil Service. One month after his discharge Blount was rehired by the City of Houston at a higher rate of pay in

the Public Works Department. His permanent personnel records do not credit him with the seven years of prior service during which he was improperly classified as a part-time worker.

The Court finds that as a result of the retaliatory conduct of the Defendant, Blount underwent harassment and hardship for more than eight months resulting, by his uncontroverted testimony, in stress and depression because of the precipitous loss of income of himself and his family, loss of sleep and headaches. Therefore, in addition to damages awarded him as a class meember (in the sum of $12,697.19), Plaintiff is entitled to $6,350.00 in compensatory claim.

There was no credible evidence presented sufficient to support a finding that the entry in Blount's personnel file of prior discharge for insubordination prevented him from being promoted in the Public Works Department.

CONCLUSION OF LAW

The Court has juridsiction of this case pursuant to 42 U.S.C. section 2000e-5 (f) (3) and 28 U.S.C. section 1331.

This Court has previously concluded that the facts of this case support a finding of discrimination by the Defendant under both the adverse impact and disparate treatment models.[1]

The Plaintiffs are entitled to recover back pay awards which completely redress the economic injury which has resulted from the unlawful discrimination. Frank v. Bowman Transporation Co., 424 U.S. 747 (1976); Rasimas v. Michigan Dept. of Mental Health, 32 FEP Cases 688 (6th Cir. 1983). The Court therefore concludes that the class members are entitled to recover the amounts set forth above in the Findings of Fact.

In addition to other back pay, all class members shall be credited with all pension rights due Group B members under Art. 6243g, Tex. Rev. Civ. Stat., as of May 2, 1975 or their date of hire, whichever is later.

Equitable awards of back pay under Title VII can be denied only for reasons which, if generally applied, would not frustrate the statutes's purpose. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The statute provides in pertinent part: "Interim earnings or amounts earnable

with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."42 U.S.C. Section 2000e-5(g).

1 See Findings of Fact and Conclusions of Law dated March 1, 1984 entered by this Court after a trial on the liability issues.

Nash argues that his back pay should not be reduced by the amount earned working for his own business because he owned such business while working for the City. Howard v. University of Southern Mississippi, 30 F. E. E. 1614 (S.D. Miss. 1980). However the evidence proves Nash hired agents to maintain his business while he was employed by the City and after Nash was fired he operated the business himself. "If a supplemental or moonlight job is one that the discrimatee cannot perform when he wins his new position, the supplemental job is necessarily temporary, provisional or 'interim'." Bing v. Roadway Express, Inc., 485 F. 2d 441, 454 (1973). The Court concludes that Nash's earnings in running his own business are "interim earnings" and as such shall be deducted from his back pay award. Accordingly, Nash's total back pay of $108,465.47 shall be reduced by $50,180.00 of "interim earnings"; therefore, Nash is entitled to a total of $58,285.47 in back pay.

In addition to an award of back pay, Nash is

entitled to reinstatement as a full-time parking attendant. Franks v. Bowman Transporation Co., 424 U.S. 727 (1976).

Since Moore was unlawfully denied the promotion to Manager position in retaliation for his testimony in support of Nash's claim. Moore is entitled to the difference in pay he received and the pay that McCullough received up to January 17, 1984, when the position was ultimately eliminated. Martinez v. EL Paso County, 710 F. 2d 1102 (5th Cir. 1983). Moore presented no evidence to show he was qualified for a Manager's position under the reorganization plan and the Court concludes he would have been demoted when the Parking Manager's position was eliminated. Accordingly, Moore is entitled to recover back pay in the amount of $22,550.00. This will make him whole, as if he had been hired for the Manager's position then demoted during the layoff and reorganization.

Blount claims he is entitled to compensatory damages pursuant to the Court's holding that the Defendant has violated 42 U.S.C. section 1981. "An

individual who establishes a cause of action under section 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975). "Specifying such damages will always be difficult, but they must be at least an amount which will assure the plaintiff that personal rights are not likely to be disregarded and that they can be truly vindicated in the courts." Halperin v. Kissinger, 606 F. 2d 1192, 1208 (D.C. Cir. 1979(, aff'd by an equally divided ct., 452 U.S. 713 (1981).

The Plaintiff's own evidence is sufficient to support compensatory damages for emotional distress. Williams v. Transworld Airlines, Inc., 660 F. 2d 1267, 1273 (8th Cir. 1971). Based on Blount's uncontroverted testimony, the Court concludes that an award of compensatory damages for anxiety and emotional distress is appropriate in the amount of $6,350.00.

The Court concludes there is no evidence to support Blount's contention that he was denied a

promotion in the Public Works Department because of the entry in his personnel records that he had been discharged by the City for insubordination. However, the Court concludes Blount is entitled to have the personnel records corrected to delete any mention of his discharge and any break in service.

The Plaintiffs are entitled to post-judgment interest at the rate provided by law. 28 U.S.C. section 1961.

Prevailing Plaintiffs in a Title VII case are entitled to recover attorney fees and taxable costs. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980); Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974). Having evaluated the Plaintiffs' attorney fees according to the 12 Johnson factors, the Court concludes that such uncontested amounts are reasonable. Accordingly, Plaintiffs are entitled to recover $76,875.00 attorneys fees for services rendered by Gordon R. Cooper, II and are entitled to $10,205.00 attorney's fes and $322.18 costs for services rendered by David T. Lopez.

In addition to monetary awards, prevailing Title VII Plaintiffs are entitled to appropriate injunctive relief. Absent clear and convincing proof that there is no reasonable probability of further noncompliance with the law, a grant of injunctive relief is mandatory. James v. Stockham Valves & Fitting Co., 559 F. 2d 310, 354 (5th Cir. 1977). There is no such clear proof regarding future noncompliance in this case, and therefore we must hereby permanently enjoin the Defendant from denying to any employee in the Civic Center Parking Division the same status, benefits, and privileges generally accorded to its employees, including, but not limited to those in its ordinances and procedures related to civil service, compensation policies, including those providing for longevity pay; employment benefits, including sick leave and vacation; pension and insurance benefits; and personnel policies, including those related to promotion and transfer. Further, Defendant is permanently enjoined from establishing or maintaining any ordinance, policy or procedure with respect to the hours of work, rates of pay, and terms and conditions of employment of

employees in the Civic Center Parking Division which is inferior to that generally applicable to employees of the City of Houston covered by the ordinances relating to civil service, or which discriminates against, limits, segregates or classifies employees of the Civic Center Parking Division in any way which would deprive or tend to deprive them of employment opportunities or otherwise adversely affect their status as employees.

The Court concludes that the Plaintiffs are not entitled to any further relief, based upon their Title VII or section 1981 claims, other than that which has been set forth above.

Done in Houston, Texas, this 30th day of April, 1985.

/s/ JAMES DEANDA
James DeAnda
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLAYBORN E. NASH	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	H-79-832
CITY OF HOUSTON	*	Consolidated with C.A.
CIVIC CENTER; ET AL.	*	H-81-1471
	*	H-81-2500
	*	H-81-2596

FINAL JUDGEMENT

This action came on before the Court for trial on issues relating to liability and hearing on the issues relating to relief, and the issues having been duly tried and heard, and a decision having been duly rendered, it is ORDERED AND ADJUDGED:

That the City of Houston be and hereby is permanently enjoined from denying to any employee in the Civic Center Parking Division the same status, benefits, and privileges generally accorded to its employees, including, but not limited to those in its ordinances and procedures related to civil service, compensation policies including those providing for longevity pay, employment benefits including sick leave

and vacation, insurance benefits, and personnel policies including those related to promotion and transfer.

Further that the City of Houston is permanently enjoined from establishing or maintaining any ordinance, policy or procedure with respect to the hours of work, rates of pay, and terms and conditions of employment or employees in the Civic Center Parking Division which is inferior to that generally applicable to employees of the City of Houston covered by the ordinances relating to civil service, or which discriminates against, limits, segregartes or classifies employees of the Civic Center Parking Division in any way which would deprive or tend to deprive them of employment opportunities or otherwise adversely affect their status as employees.

That members of the class as defined by the Court recover from the City of Houston back pay as set forth below:

Class Members	Payment Due
Moses Adams	$ 2,731.18
Danny Allen	2,286.42
George Allen	2,855.40
Okoli Bennett	9,963.24
Romie J. Blount	12,697.19

Jerry L. Buckley	8,288.43
Calvin E. Clay	3,144.14
Allen Connerly	2,643.10
Barbara Flanagain	771.78
G. W. Garrett	9,943.24
Walter Garrett	17,166.68
Riley Gilliam	3,086.06
Albert J. Hamilton	17,166.68
Dorothy Lee Harris	5,787.73
Robert E. Holden, Jr.	14,863.14
C.V. Hunt	3,614.51
Ann Marie Jackson	13,683.68
Clifton Jackson	10,660.19
Kenneth Jackson	2,112.48
Lonnie Johnson	7,221.61
Vincent Johnson	2,168.75
Margie Lewis	4,569.90
Mable J. Moore	1,703.17
Curtis Joe Porter	12,160.29
Leo Porter	9,208.49
Naymond D. Roach	8,447.78
Clarence Robinson	9,136.00
Raymond A. Rymer	7,076.21
Michael E. Sherman	4,206.30
Eddie Sims	13,683.68
Debbie Smith	4,868.99
Jeffery O. Taylor	13,171.09
Jessie G. Taylor	595.52
Joe D. Teagle	12,174.29
Lonnie Teagle	606.06
Bernice Washington	14,793.21
Leonard M. Williams	570.77

That the total amount back pay Clayborn E. Nash shall recover from the City of Houston is $58,285.47. In addition, the City of Houston shall reinstate Clayborn E. Nash to the position of full-time parking attendant.

That Alvin Moore recover from the City of Houston back pay in the amount of $22,550.00.

That Romie Blount recover from the City of Houston in addition to the back pay awarded above, compensatory damages in the amount of $6,350.00. Furthermore, the City of Houston shall correct Blount's personnel records to delete any mention of his discharge and any break in service.

All class members shall be credited with all pension rights due Group B members under Article 6243g, Tex. Rev. Civ. Stat., as of May 2, 1975, or their date of hire, whichever is later.

That Plaintiffs recover from the City of Houston attorneys' fees and costs as set forth below:

Attorney's Fees of Gordon R. Cooper, II	$76,875.00
Attorney's Fees of David T. Lopez	$10,205.00
Cost incurred by David T. Lopez	322.78

That Plaintiffs are entitled to post-judgment interest on all of the above at the rate of 9.15 per annum.

All taxable costs are hereby assessed against the Defendant City of Houston.

Let execution issue on all the above.

This is a Final Judgment.

Done in Houston, Texas, this 30th day of April, 1985.

/s/ JAMES DEANDA
James DeAnda
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLAYBORN E. NASH	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	H-79-832
CITY OF HOUSTON	*	Consolidated with C.A.
CIVIC CENTER; ET AL.	*	H-81-1471
	*	H-81-2500
	*	H-81-2596

MEMORANDUM AND ORDER OF DISMISSAL

On March 11, 1987, the Court ordered all motions regarding attorney's fees filed by April 11, 1987. On April 9, 1987, counsel for Plaintiff Moore filed his second motion for attorneys's fees. Upon review of the appellate decision in this case, however, the Court has determined that it lacks jurisdiction to rule on the pending motion. The appellate opinion clearly states that "remand for consideration for attorney's fees . . . is unwarranted."

The court of appeals reversed and ordered dismissed the claims of the plaintiff class, Nash and Blount. The court vacated the injunction. The court affirmed the denial of the petition for intervention and

the judgment entered the favor of Moore. All issues having been resolved, the Court.

ORDERS this case DISMISSED WITH PREJUDICE.

DONE In Houston, Texas, this 13th day of April, 1987.

/s/ JAMES DEANDA
James DeAnda
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLAYBORN E. NASH ET AL.	*	
VS.	*	CIVIL ACTION NO. H-79-832
CITY OF HOUSTON CIVIC CENTER; ET AL.	*	Consolidated with C.A. H-81-1471 H-81-2500 H-81-2596

MEMORANDUM AND ORDER

Pending before the Court is Defendant City of Houston's motion for reimbursement of prepaid attorney's fees and Mr. Lopez's counter-motion for an offset. Mr. Lopez seeks an offset of $6,000.00, that amount representing attorney's fees expended on Plaintiff Moore's case on appeal.

Due to post-trial conflicts between trial counsel and class members, the Court appointed Mr. Lopez before entering a final judgment. Mr. Lopez subsequently represented all Plaintiffs on appeal. Mr. Lopez argued and prevailed on Plaintiff Moore's claim on

appeal. Thus, the Court would be inclined to grant Mr. Lopez's motion for an offset.

The Court, however, has concluded that it must deny Mr. Lopez's motion. First, even though Plaintiff Moore prevailed on appeal, the court of appeals taxed all costs against the plaintiffs in its September 24, 1986, judgment.

Second, the appellate decision states that "(t)he record convinces us that only trival effort was expended by counsel on Moore's personal claim and that remand for attorney's fees. . . is unwarranted." The appellate court's language fails to distinguish between the various counsel for the plaintiffs. The statement also fails to distinguish between counsel's efforts in the trial court and on appeal. Thus, the Court finds that this language preludes granting Mr. Lopez's motion.

Thus, the Court Orders Mr. Lopez's motion for an offset is DENIED. The Court further

ORDERS Defendants' motion for reimbursement is

GRANTED in its entirety.

DONE in Houston, Texas, this 10th day of June , 1987.

/s/ JAMES DEANDA
James DeAnda
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2723

(Summary Calendar)

CLAYBORN E. NASH, Plaintiff,

GORDON R. COOPER, II and
DAVID T. LOPEZ,

versus Appellants,

CITY OF HOUSTON CIVIC CENTER

Defendant-
Appellee.

Appeals from the United States District Court
for the Southern District of Texas
(CA-H-79-832)

(December 9, 1987)

before POLITZ, JOHNSON and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

In Nash v. City of Houston Civic Center, 800 F. 2d 491 (5th.) reh'g denied, 805 F. 2d 1030 (1986), we affirmed the judgment in favor of Alvin Moore but reversed the judgment for a

*Local Rule 47.5 provides: "The publication of opinions have no precedential value and merely decide

particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

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class and two other individuals. As to attorney's fees relating to Moore, we observed:

> that only trival effort was expended by counsel on Moore's personal claim and that remand for consideration of attorney's fees isolated for this case is unwarranted. If affidavits to the contrary are presented on rehearing, they will be considered.

800 F. 2d at 497. Moore's trial counsel, Gordon R. Cooper, II filed an affidavit seeking attorney's fees in a petition for rehearing. Moore's appellate counsel, David T. Lopez, filed a petition for panel and en banc rehearing on behalf of the class but did not seek attorney's fees. We denied all petitions.

800 F.2d 1030.

The trial court reopened the preceedings and

considered a motion by Cooper for attorney's fees and a motion by the City of Houston for reimbursement of the partial award of attorney's fees paid pending appeal. The trial court determined that our decision precluded an award of fees to either Cooper or Lopez. Cooper and Lopez appeal; we affirm.

Analysis

The language of our prior panel opinion is clear. We determined that an award of attorney's fees to Moore's attorneys was not in order, but we did not forclose the possibility of reconsideration of that ruling. We invited counsel if they differed with our resolution, to file affidavits concerning attorney's fees in their petitions for rehearing. Cooper chose to do so but after reconsideration of the record, including his affidavit, we declined to award attorney's fees. Lopez filed petitions for rehearing for his clients but opted not to file an affidavit for attorneys' fees.

Cooper maintains that he should be granted attorney's fees for his efforts on behalf of Moore. We previously rejected his application. 800 F. 2d at 497.

We do so again, both on the merits and pursuant to the law of the case doctrine. Schwartz v. NMS Industries, Inc., 575 F.2d 553 (5th Cir. 1978).

Lopez maintains that our prior decision does not preclude his present claim. He seeks only a set-off of $6,000, the stipulated value of his legal services on appeal, against the amount the trial court ordered reimbursed to the City of Houston. Lopez valiantly argues that the services he provided on appeal, after being appointed for the appellate work, does not come within the reach of our prior mandate. Unfortunately for counsel, the language of our holding is clear and it manifestly embraces his claim. He should have accepted the invitation of the prior panel and presented to it his legal and equitable claims for attorney's fees. He did not do so. That panel denied attorney's fees to Moore. This panel may neither overrule nor ignore the ruling of the prior panel; that is the exclusive prerogative of the en banc court. We therefore must and do AFFIRM.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2723

CLAYBORN E. NASH, Plaintiff,

GORDON R. COOPER, II and
DAVID T. LOPEZ,

versus Appellants,

CITY OF HOUSTON CIVIC CENTER

Defendant-
Appellee.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING
(JANUARY 5, 1988)

Before POLITZ, JOHNSON and HIGGINBOTHAM,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United District Circuit Judge

AFFIDAVIT

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared GORDON R. COOPER,II, known to me to be a credible person competent in all respects to make this affidavit, and who, being by me sworn upon oath, stated:

1. I was the attorney of record of for:
   a. Plaintiff Ronnie Blount throughout the trial phase of this cause;
   b. Plaintiff Clayborn Nash throughout the trial phase of this cause;
   c. Plaintiff Alvin Moore throughout the trial phase of this cause; and
   d. Plaintiff Class throughout most of the trial phase of this cause.
2. I filed a verified request for Attorney's fees with the trial court regarding the time I expended for the above-named Plaintiff's (See Exhibit "A" attached herein). The total number of hours expended in this case was Five Hundred & Twelve (512).

3. That as a matter of practice, when I have more than one named Plaintiff on a case, I often use the name of the first named Plaintiff to refer to the file/case or no reference to Plaintiff but rather the service performed on that particular file.

4. That with regards to the Request for Attorney's fees which I filed with the trial court, I liberally used the title "Nash" to characterize the parties that I represented or listed work performed.

5. That I expended at least one-fourth of the Five Hundred & Twelve (512) hours that was awarded to me by the trial court on Moore resulting in One Hundred and Twenty-Eight (128) hours attributable to Moore.

6. That I was not paid a retainer for attorney's fees by any of the Plaintiffs.

7. That the information contained in the preceding Motion for Rehearing and in this Affidavit are true and correct.

_____

signed Gordon R. Cooper, II

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLAYBORN E. NASH	*	
ET AL.	*	
VS.	*	CIVIL ACTION NO.
	*	H-79-832
CITY OF HOUSTON	*	
CIVIC CENTER; ET AL.	*	

AFFIDAVIT

I am an attorney licensed by the Supreme Court of Texas on or about September 20, 1971, I am licensed to practice before all Texas Courts, the United States District Court for the Southern District of Texas, the Fifth Circuit Court of Appeals, the United States Supreme Court. The information contained in my application for attorney fees is based on my time records maintained on the Nash case since 1977 and they are true and correct.

SIGNED this ___ day of _____, 1988.

signed _____
GORDON R. COOPER, II

SWORN AND SUBSCRIBED TO BEFORE ME on this 8th day of March, 1988

Notorized

Notary Public for
The State of T E X A S

EXHIBIT "A"

1977 - 1980

04/19/77	Initial Interview with Plaintiff Earl Nash - Entered into employment contract. 3 hours
04/20/77	Meeting with Plaintiff to further determine cause of action - whether class includable 2 hours
04/22/77	Research to determine applicable law - to determine whether class is certifiable 6 hours
04/26/77	Meeting with Plaintiff, drafting of EEOC Charge and filing of the same 2 hours
04/30/77	Meeting with Potential class members - to determine the use of the knowledge in case 3 hours
04/24/79	Drafting Nash's Petition and review for filing 3 hours
05/25/79	Reviewed Defendant's Answer 1 hour
06/08/79	Drafting and filing of Plaintiff's First Interrogatories 5 hours
06/26/79	Review Special Order - Judge Seal ½ hour
07/30/79	Notice to depose Lowery and Preparation for his deposition 2 hours
08/06/79	Review of Deposition change ¼ hour

08/28/79	Determining documents needed and filing Request For Production of Documents 2 hours
09/79	Joint Motion For Enlargement, Order and filing 2 hours
12/11/79	Preparation for deposition and Drafting Notice to depose 4 hours
01/07/80	Preparation of Nash deposition 3 hours
01/14/80	Motion For Enlargement of Time and Order
4/25/80	Review discovery and defendant's response to Plaintiff's First Interrogatories 5 hours
4/28/80	Further review discovery; Defendant's response to Plaintiff's First Interrogatories 4 hours
4/29/84	Initial preparation - Motion to Certify 5 hours
5/1/80	Motion to Certify - Nash 6 hours
5/3/80	Motion to Certify - Prepare Exhibits 7 hours
5/8/80	Motion to Certify - Review and File 4 hours
5/19/80	Review of Defendant's First Interrogatories and answering 3 hours

6/4/80	Review of Defendant's Response to Plaintiff's Motion to Certify 3 hours
6/5/80	Further review of Defendant's Rule 23 - Motion response 1½ hours
6/7/80	Review Defendant's response to Plaintiff's Motion to Certify 6 hours
6/23/80	Nash's response to Defendant's Interrogatories 3 hours
6/24/80	Filing answers to interrogatories 1 hour
9/2/80	Docket Call - Nash and attending Conference (Seals) 2 hours
10/16/80	Meeting Walter Garrett - Re: Nash case ½ hour
12/22/80	Prepare Class hearing 6 hours
12/23/80	Attended conference - Re: Class questions 2 hours

1981

01/21/81	Amended Petition	3 hours
01/22/81	Filing Amended Petition	1 hour
02/06/81	Review Defendant's Amended Answer	20 min.
02/20/81	Reviewed State's (?) Answer	1/2 hour
02/16/81	Amended Motion to Certify	3 hours
02/17/81	Amended Motion to Certify	5 hours
02/18/81	Filing of Amended Motion To Certify	1 hour
04/21/81	Meeting witnesses class hearing - Nash	4 hours
04/23/81	Preparing Class hearing	5 hours
04/24/81	Preparing Class hearing	4 1/2 hours
04/25/81	Preparing Class hearing Nash	4 hours
04/27/81	Preparing and attending Class hearing	9 1/2 hours
04/28/81	Preparing certification order	2 hours
04/30/81	Meeting with class members - Harris and Blount - details; RE: Practices of Defendant	3 hours

05/21/81	Reviewing Evidentiary hearing on Rule 23, Motion and file to determin needed discovery 6 hours
06/06/81	Detailed interview and drafting of original petition (Moore) 5 hours
06/23/81	Reviewed Defendant's Motion to dismiss and research position 2 hours
06/29/81	Response to Defendant's Motion To Dismiss (Moore) 3 hours
07/01/81	Meeting with Fisher, et al - Nash 2 hours
07/04/81	Meeting with Nash Class members 2 1/2 hours
08/12/81	Analysis of discovery data - Nash 4 hours
09/21/81	Motion to Stay further proceedings - Moore and filing 2 hours
09/23/81	Detailed meeting with Romie Blount and review of material 5 hours
09/24/81	Romie Blount's petition 3 hours
10/02/81	Review of Defendant's Renewed Motion to Dismiss Moore 2 hours
10/19/81	Response to Defendant's Renewed Motion to Dismiss (Moore) 5 hours
10/31/81	Meeting with Blount, Garrett and Nash - general preparation 2 hours

11/05/81	Reviewed Defendant's Motion To Dismiss (Blount)	3 hours
11/14/81	Response to Motion To Dismiss (Blount)	5 hours

1982

03/20/82	Review docket control order entered March 10, 1982 to determine ability to comply with same 1 hour
07/07/82	Review of discovery in file to determine data needed for litigation 5 hours
07/08/82	Further review of discovery file and preparation of Plaintiff's Second Interrogatories 6 hours
08/10/82	Review of Defendant's response to Plaintiff's Second Interrogatories and drafting Motion to Compel answer to same and filing 3 1/2 hours
08/31/82	Motion ot Reconsider Order and filing 3 hours
09/03/82	Motion For Continuance, Order and filing 1 1/2 hours
10/04/82	Preparing and attending conference 1 1/2 hours
11/09/82	Review of Nash, Blount and Moore and other pleadings to prepare unified complaint 4 hours
11/29/82	Meeting - Garrett and Blount RE: Consolidation Issue 1 hour
12/10/82	Nash unified petition - drafted 3 1/2 hours
12/13/82	Nash unified complaint, reviewed and filed 2 hours

12/15/82	Preparation For Deposition of Blount and Moore	3 hours
12/17/82	Preparation and attending deposition Blount and Moore	6 hours

1983

01/25/83	Meeting with Blount and Garrett RE: Material they wanted revealed and reviewed material in file	2 hours
02/07/83	Civic Center reviewing Records	3 hours
02/08/83	Civic Center meeting Employees RE: Record	2 hours
03/01/83	Docket Call	1 hour
03/01/83	Exhibit List and filed (est)	2 hours
03/11/83	Proposed Order to redefine Class and filing (est)	2 hours
03/22/83	Preparation and meeting Atty. Halsey RE: Nash	2 hours
03/23/83	Meeting Atty. Halsey - Preparation for Trial	3 hours
03/29/83	Meeting Atty. Halsey - Preparation of Trial	3 hours
04/13/83	Initial Preparation of Trial - Nash	4 hours
04/22/83	Preparation of Trial - Nash	4 hours
04/25/83	Preparation and attending Pre-Trial Conference	2 hours

04/25/83	Nash Trial Preparation	6 hours
04/27/83	Nash Trial Preparation	6 hours
04/29/83	Preparation and Filing - Proposed Findings of Fact and Conclusion of Law	5 hours
05/02/83	Trial Preparation - Rivew Witness and testimony to be heard in trial	5 hours
05/09/83	Preparation and filing of Witness List	2 hours
05/11/83	Trial Preparation - Nash	5 hours
05/16/83	Trial Preparation - Exchange and filed Exhibit List	2 hours
05/17/83	Nash Trial Preparation	3 hours
05/18/83	Nash Trial Preparation	6 hours
05/19/83	Trial Preparation	7 hours
05/20/83	Trial Preparation GRC 9 - JSC 7	16 hours
05/21/83	Trial Preparation GRC 6 - JSC 6	12 hours
05/22/83	Trial Preparation GRC 7 - JSC 7	14 hours
05/23/83	Trial Preparation GRC 9 - JSC 3	12 hours
05/24/83	Trial Preparation GRC 9 - JSC 3	12 hours

05/26/83	Reorganization and Preparation for the Trial	3 hours
06/11/83	Nash Trial Preparation	2 hours
06/12/83	Nash Trial Preparation GRC 4 - JSC 2	6 hours
06/13/83	Preparation and Trial	9 hours
06/14/83	Preparation and Trial	8 hours

1984

03/13/84	Review and Analysis - Nash opinion 3 hours
03/14/84	Review Records to determine class members 6 hours
03/16/84	Determining class damages 3 hours
03/17/84	Meeting class members to determining damages 2 1/2 hours
03/21/84	Meeting with Judge - RE: procedure determining damages & attorneys fees 2 hours
04/03/84	Reviewing records to determine class members 3 hours
04/05/84	Telephone conference with Fisher on class language 3 1/2 hours
04/25/84	Nash Class clarification 3 hours
05/03/84	Determining class members - Preparation and meeting with Fisher to work on class language 4 hours
05/04/84	Meeting with Judge DeAnder 1 hour
05/06/84	Determining class memberships - Notices Proposed damages - Nash GRC 6 - JSC 6 12 hours
05/07/84	Filed with Proposed Class members - proposed notification 1 1/2 hours
05/09/84	Nash class questions 2 hours

05/10/84	Preparation and meeting to determine damages	8 hours
05/11/84	Determining damages	4 hours
05/15/84	Meeting with Moore to determine damage	1 hour
05/16/84	Securing Order - Meeting with Fisher	1 1/2 hours
05/19/84	Meeting with class members - Cooper and Halsey	3 1/2/hours
05/21/84	Damage Analysis - Moore	2 1/2 hours
05/23/84	Notice Letter - Nash	2 hours
06/02/84	Meeting with class members and other damages problems GRC 3 1/2 - JSC 3 1/2	7 hours
06/05/84	Salary study Moore - McAllen Preparation and Meeting with Nash	4 1/2 hours
06/06/84	Preparation and Meeting with Moore	1 1/2 hours
06/13/84	Meeting with Fisher RE: Nash damages	3 1/2 hours
08/23/84	Meeting with Lopez RE: Nash file	3 1/2 hours
03/08/85	Preparation RE: Damage Hearing	4 hours
03/09/85	Preparation RE: Damage Hearing	2 hours

03/11/85	Meeting with Moore and Preparation RE: Damage Hearing	2 hours
03/12/85	Preparation RE: Damage Hearing	1 hour
03/13/85	Meeting with Nash and Preparation RE: Damage Hearing	2 hours
03/14/85	Attending Damage Hearing estimated	3 hours

TOTAL HOURS

512.05

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLAYBORN E. NASH ET AL. VS.	*	CIVIL ACTION NO. H-79-832
CITY OF HOUSTON CIVIC CENTER; ET AL.	*	

MEMORANDUM AND ORDER

Pending before the Court is Defendant City of Houston's motion requesting the Court to order Gordon Cooper to return attorney's fees paid pending appeal.

Mr. Cooper was awarded $76,875.00 in attorney's fees after trial. Defendant paid Mr. Cooper $15,000.00 of that amount while the case was on appeal. The court of appeals reversed this Court's judgment on all but Plaintiff Moore's claim. Mr. Cooper sought attorney's fees for Moore's claim. On April 13, 1987, this Court denied Mr. Cooper' motion for attorney's fees, citing language in the appellate opinion and finding that this Court lacked jurisdiction to rule on Mr. Cooper's motion.

Mr. Cooper has subsequently failed to return the $15,000.00 prepaid attorney's fees to Defendant. The Court thus GRANTS Defendant's motion for reimbursement and

ORDERS Mr. Cooper to pay Defendant $15,000.00 by June 15, 1987.

DONE In Houston, Texas, this 29th day of May, 1987.

/s/ JAMES DEANDA
James DeAnda
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLAYBORN E. NASH ET AL.	*	
VS.	*	CIVIL ACTION NO. H-79-832
CITY OF HOUSTON CIVIC CENTER; ET AL.	*	

ORDER

The Court ORDERS Gordon R. Cooper's motion to reconsider is DENIED.

DONE in Houston, Texas, this 17th day of June, 1987.

/s/ JAMES DEANDA
James DeAnda
United States District Court

Supreme Court, U.S.
FILED
APR 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1627

In The

Supreme Court of the United States

October Term, 1987

CLAYBORN E. NASH AND
GORDON R. COOPER II,

Petitioners,

vs.

CITY OF HOUSTON CIVIC CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN E. FISHER
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Telephone (713) 247-2059

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Court of Appeals correctly applied the requirements of *Hensley v. Eckerhart* to the Plaintiff's request for attorney's fees?

LIST OF ALL PARTIES TO THE PROCEEDINGS

CLAYBORN E. NASH of Houston, Texas – Lead Plaintiff in the class action below and only a nominal Petitioner here.

ALVIN MOORE of Houston, Texas – only Prevailing Plaintiff below and should be listed as a Petitioner before this Court, but is not presented as such in the Petition for Writ of Certiorari.

GORDON R. COOPER II of Houston, Texas – Attorney for the class members and for Alvin Moore individually through the trial of the liability issues.

CITY OF HOUSTON CIVIC CENTER is a department of the City of Houston, Texas, a municipal corporation.

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COUNTERSTATEMENT OF THE CASE

Although Petitioners' "Statement of the Case" (Petition at 4-7) correctly sketches the chronology of events bringing this litigation to this Honorable Court's doorstep, it also tends to obscure the nature of the issue currently presented and thereby make it seem more complex than it actually is. As a consequence, a different perspective is offered by this counterstatement.

This is not a simple case in which a single plaintiff sued and won a case of employment discrimination and then was denied a properly presented request for an award of attorney's fees. At times Petitioners seem to suggest at least by implication that this is such a case. The present issue is in some ways analogous to a small piece of debris that was accidently propelled far away from the scene of a pitched battle. Long after the conclusion of the battle, a stranger discovers this unusual object and is perplexed in trying to understand it. With some knowledge of that distant battle this stranger could better comprehend the nature of the fragment and its relation to that conflict. In that vein, it must be pointed out that the real focus of the litigation below, both in the District Court and the Court of Appeals, was a class action styled *Clayborn E. Nash v. City of Houston Civic Center*, Civil Action No. H-79-832, brought by black part-time parking attendants employed by the City of Houston Civic Center. They alleged that their part-time classification, which did not include the same benefits given full-time employees, was racially discriminatory because the parking attendants, as a group, were predominantly black, though the white parking attendants held the

same part-time classification. It was the *Nash* suit to which Petitioner Gordon Cooper's time as an attorney was largely devoted from its filing in 1979, through discovery, a hearing on class certification, and trial on the issue of liability.

In contrast, the claim of Alvin Moore, for which attorney's fees are now being sought, was at best a minor issue – a fragment that later would be totally separated from the main battle. It was filed in April, 1981, as a separate suit, *Alvin Moore v. City of Houston Civic Center*, Civil Action No. H-81-1471. In 1982, it was consolidated with *Nash* upon the City's Motion. (See the Docket Sheet of No. H-81-1471) Compared to the claims at issue in behalf of the class, Moore's claim was simple. As a supervisor of the parking attendants, Moore was a full-time employee, not a class member. (Petitioners' Appendix at A-6). He applied for the position of Parking Garage Manager in 1980 but was not selected. (A-7) The District Court found that he was denied the position in retaliation for giving testimony in support of Nash's claims. (A-6-7) Moore was granted the resulting salary differential as backpay in the amount of $22,550. (A-7-8, A-13) The Court of Appeals affirmed this finding as not clearly erroneous. (800 F.2d at 497)

Petitioners incorrectly state that in "an almost unprecedented act" the Court of Appeals "reversed the attorney's fees awarded Moore's trial counsel, Mr. Cooper" (Petition at 6) because this suggests that the District Court had somehow awarded attorney's fees separately for Moore's claim. In fact, the award of $76,875.00 to Cooper was for his total representation of

the class members and of three individual plaintiffs through the trial of the liability issue. (A-21) Since Moore was the only prevailing party even arguably entitled to attorney's fees, it is not surprising that the Court of Appeals set aside the total award that was largely for work done in behalf of non-prevailing parties.

Nor was it surprising that the Court of Appeals was convinced from its own review of the record that "only trivial effort was expended by counsel on Moore's personal claims. . . ." (800 F.2d at 497) Moore's claim of retaliation was relatively limited in nature: either he was denied a promotion because of retaliatory motives or he was not. The record was clear that the testimony concerning his retaliation claim was almost exclusively that of Moore himself and that of Jim Gatlin, an Assistant Director in the Civic Center. Neither the District Court nor the Court of Appeals concluded that Moore's claim required any extensive analysis. (A-6-7, A-13; 800 F.2d at 497) No novel legal questions were involved. The issue was simply one of credibility.

Yet the Court of Appeals did not completely foreclose the possibility of an award of attorney's fees for Moore as a prevailing plaintiff and invited affidavits on that issue on a motion for rehearing. (800 F.2d at 497) Cooper's affidavit which he filed on rehearing was basically the same affidavit he had previously filed with the District Court in 1985 in support of fees for all of the claims. (*Cf.* Petitioners' Appendix, F-1-18 and Docket Entry #139) Inexplicably it still included entries for work going back to 1977, some four years before Moore's suit was filed. (F-5-8) In his affidavit on

rehearing Cooper in essence admitted his time records were not kept separately on Moore's claim but nevertheless asserted in conclusory fashion that one-fourth of the total hours claimed were "attributable to Moore." (F-1) The Court of Appeals denied the request. 805 F.2d 1030. No petition for writ of certiorari was filed regarding this action by the Court of Appeals. In effect, Cooper "appealed" the issue of his fee entitlement back to the District Court by filing a "Second Motion for Attorney's Fees." The District Court denied that request. That denial was appealed to the Court of Appeals which affirmed. It is the latter action of the Court of Appeals for which Petitioners now seek review by this Honorable Court.

REASONS FOR DENYING THE WRIT

This case is not one meriting review by this Honorable Court. Petitioners have not established any of the considerations set forth in this Court's Rule 17. Despite their suggestions to the contrary (Petition at 11-13, 23-24), the decision of the Court of Appeals is not in conflict with any other decision of another Court of Appeals or of this Court. This case presents no important legal issue that this Court has not decided but should decide. The actions of the lower courts were not of such a nature as to call for an exercise of this Court's power of supervision.

I. The Court of Appeals Correctly Applied the Requirements of *Hensley v. Eckerhart* to the Plaintiff's Request for Attorney's Fees.

Petitioners argue that the Court of Appeals ignored *Hensley v. Eckerhart*, 461 U.S. 424 (1983) in denying fees (Petition at 11) but in reality it is Petitioners who are ignoring its clear teachings. First, it is clear that Moore's claim for relief did not involve a common core of facts nor was it based on related legal theories connected with the allegations of the class members. Thus, the class claims and the individual claims of the three named Plaintiffs must be reviewed as a series of discrete claims. As this Court observed in *Hensley*:

> "In some cases, a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved,' *Davis v. County of Los Angeles*, 8 E.P.D. at 5049. The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." 461 U.S. at 434-435.

If this is to be the case for distinct claims by the *same* plaintiff, it follows *a fortiori* that where distinct claims are by *different* plaintiffs, no fee is available on the unsuccessful plaintiffs' claims. Thus, the Court of Appeals correctly set aside the District Court's fee award. (*Cf.* Petition at 13)

If attorney's fees may be allowed to Moore alone as the only successful claimant, the next question to be examined is in what amount. Here, too, *Hensley* provides significant guidance:

> "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise 'billing judgment' with respect to hours worked . . . and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." 461 U.S. at 437.

In his concurrence, Chief Justice Burger added these common sense observations:

> "I read the Court's opinion as requiring that when a lawyer seeks to have his adversary pay the fees of the prevailing party, the lawyer must provide detailed records of time and services for which fees are sought. . . . A district judge may not, in my view, authorize the payment of attorney's fees unless the attorney involved has established by clear and convincing evidence that time and effort claimed and shown that the time expended was necessary to achieve the results obtained." 461 U.S. at 440-441.

It is obvious that the Court of Appeals had these teachings of *Hensley* in mind when it observed:

> "The record convinces us that trivial effort was expended by counsel on Moore's personal claim and that remand for consideration of attorney's fees isolated for this cause is unwarranted. If affidavits to the contrary are presented on motion for rehearing, they will be considered." 800 F.2d at 497.

Under *Hensley* the key word is "isolated"! Cooper's affidavit and time records in support of attorney's fees

were clearly inadequate in that regard. Although it is flatly asserted (Petition at 6) that Mr. Cooper's affidavit showed that some 128 of the 512 total hours of attorney time were devoted to Moore's claim, that is not so readily apparent from reviewing the time records submitted. In the affidavit (F-1) he admitted that he kept his time records without reference to the particular plaintiff for which the services were performed. Beyond making this conclusionary assertion, nowhere does Mr. Cooper explain or support his contention that 128 hours were somehow attributable to Moore's claim. It may simply stem from an arbitrary division of clients, i.e. the class as one entity and the three individual plaintiffs. However, it must be remembered that the total hours claimed (512) cover a time-span from 1977 to 1985, while Moore's suit was not filed until mid-1981. If, indeed, one-fourth of the total hours were devoted to Moore's claim, then more than one-fourth of the hours claimed from mid-1981 to 1985 had to be expended in behalf of Moore. The entries made do not reflect that fact. To the contrary, as any experienced lawyer familiar with class actions would anticipate, the bulk of the entries relates to the claims of the class. Cooper's affidavit and time records merely confirmed the initial conclusion by the Court of Appeals that only trivial effort had been expended on Moore's claim.

Petitioners rely on *Tomazzoli v. Sheedy*, 804 F.2d 93 (7th Cir. 1986); *Zabkowicz v. West Bend Co., Div. Dart Industries*, 789 F.2d 540 (7th Cir. 1986); *Gekas v. Attorney Registration and Disciplinary Com'n.*, 793 F.2d 846 (7th Cir. 1986); and *Jordan v. United States Dept. of Justice*, 691 F.2d 514 (D.C. Cir. 1982), for the general

proposition that prevailing plaintiffs are usually awarded attorney's fees. (Petition at 18-19, 22) However, at least two of these cases also stand for the proposition that where a fee request is so egregious or an attorney's recordkeeping is so inept, a complete denial of attorney's fees may be warranted. *Zabkowicz, supra*, 789 F.2d at 550. In *Jordan, supra*, it was observed that:

> " . . . the Court may, as a means of enforcing the applicable standards, deny a fee motion when the submission is 'manifestly inadequate.' . . . [I]n suitable circumstances, disallowance of attorney's fees would serve as a 'means of encouraging counsel to maintain adequate records and submit reasonable, carefully calculated and conscientiously measured claims.'
>
> "Total denial of requested fees as a purely prophylactic measure, however, is a stringent sanction, to be reserved for only the most severe of situations, and appropriately invoked only in very limited circumstances. Outright denial may be justified when the party seeking fees declines to proffer any substantiation in the form of affidavits, timesheets or the like, or when the application is grossly and intolerably exaggerated, or manifestly filed in bad faith." 691 F.2d at 518.

The present case falls within these standards meriting an outright denial of attorney's fees. The request for 128 hours for handling a simple retaliation claim is excessive and egregious, and it is evident that the recordkeeping for the work on Moore's claim was virtually non-existent. The presence of these factors firmly support the action of the Court of Appeals in denying fees.

This case presents no significant legal issue that this Court needs to address. Instead it is only a glaring example of the failure of an experienced attorney to keep adequate time records relating to his services for a prevailing plaintiff. Petitioners rhetorically maintain that the "denial of attorney fees awards to successful civil rights litigants is a grave and unconscionable precedent for this area of our jurisprudence." (Petition at 23) The denial of attorney's fees in this case will not, as Petitioners assert (*id.* at 18), chill the undertaking of civil rights litigation but rather will merely serve as an effective warning that the requirements of documentation for fee claimants are meaningful and will be enforced by the Courts.

CONCLUSION

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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